UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Civil No.01-02062 (GK)
COMPUTER ASSOCIATES INTERNATIONAL, INC.; and PLATINUM *TECHNOLOGY* INTERNATIONAL, *INC*.,	)	
Defendants.	)	

COMPETITIVE IMPACT STATEMENT

The United States, pursuant to the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement to set forth the information necessary to enable the Court and the public to evaluate the proposed Final Judgment that would resolve the allegations in the civil antitrust suit filed by the United States on September 28, 2001.

I. NATURE AND PURPOSE OF THIS PROCEEDING

The United States filed a two-count Complaint against Computer Associates International, Inc. ("CA") and Platinum *technology* International, *inc*. ("Platinum") related to the Defendants' conduct surrounding CA's $3.5 billion acquisition of Platinum. Count One alleges that the Defendants entered into an agreement that illegally restrained trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Prior to their merger, CA and Platinum aggressively competed in numerous software markets. The Complaint alleges that, under the Merger Agreement, Platinum could not, without CA's prior written approval, offer customers

discounts greater than 20% off list prices. During the time between the signing of the Merger Agreement and the closing of the merger (the "pre-consummation period"), Platinum's sales representatives were required to submit pre-approval forms to CA which contained competitively sensitive information about Platinum's customers and its prospective bids for new business. The pre-approval forms were sent to a CA Divisional Vice President located at Platinum's Illinois headquarters where he exercised the authority to approve or reject proposed Platinum customer contracts seeking discounts greater than 20% off list prices. The agreement to limit discounts and the Defendants' actions to effectuate their agreement chilled Platinum's ability to compete against CA and had the effect of denying Platinum's and CA's customers the benefits of free and open competition. The Complaint asks the Court to declare the agreement to be unlawful and seeks an injunction to prevent CA from entering into similar agreements in the future.

In Count Two, the United States alleges that the Defendants violated Title II of the Hart-Scott-Rodino Antitrust Improvement Act of 1976 ("HSR Act"), 15 U.S.C. § 18a, which requires merging parties in certain instances to file pre-acquisition Notification and Report Forms with the Department of Justice ("DOJ") and Federal Trade Commission ("FTC") and observe a mandatory waiting period before acquiring any voting securities or assets of to the to-be-acquired person. The fundamental purpose of the HSR waiting period is to prevent the merging parties from combining during the pendency of an antitrust review, thereby ensuring that they remain separate and independent actors. The Defendants' Merger Agreement and pre-consummation conduct altered their status as separate and independent economic actors by transferring to CA control of substantial aspects of Platinum's business. In addition to discounts,

CA exercised approval authority over other terms and conditions of Platinum's customer contracts and over Platinum's ability to offer consulting services at a fixed price and year 2000 ("Y2K") remediation consulting services. Further exercising its control over Platinum during the pre-consummation period, CA obtained competitively sensitive bid information and made decisions about Platinum's recognition of revenue and participation at industry trade shows. The Complaint seeks a civil penalty for violation of the HSR Act.

After this suit was filed, the United States and Defendants reached a proposed settlement that eliminates the need for a trial in this case. The proposed Final Judgment remedies the Section 1 violation by prohibiting CA in future acquisitions from agreeing on prices, approving customer contracts, and misusing competitively sensitive bid information. CA and Platinum would also agree to pay a $638,000 civil penalty to resolve the HSR Act violation.

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA, unless the United States first withdraws its consent. Entry of the proposed Final Judgment would terminate this action, except that this Court would retain jurisdiction to construe, modify or enforce the provisions of the proposed Final Judgment and to punish violations thereof. Entry of judgment would not constitute evidence against, or an admission by, any party with respect to any issue of fact or law involved in the case and is conditioned upon the Court's finding that entry is in the public interest.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION OF THE ANTITRUST LAWS

A. Background

1. The Defendants and the Merger Investigation

CA is a Delaware corporation with its principal place of business in Islandia, New York. CA develops, markets, and supports software products for a variety of computers and operating systems, including systems management software for computers that use IBM's OS/390, VSE and VM operating systems ("mainframe computers"). Systems management software products are used to help manage, control, or enhance the performance of mainframe computers. CA, in its 1998 fiscal year, reported revenues in excess of $4.7 billion.

Platinum was a Delaware corporation with its principal place of business in Oakbrook Terrace, Illinois. Platinum, like CA, was a leading vendor of mainframe systems management software products. In addition to its software business, Platinum offered computer consulting services, including Y2K remediation services. In its fiscal year 1998, Platinum reported revenues of about $968 million.

Prior to March 1999, Platinum aggressively competed with CA in the development and sale of numerous software products, including mainframe systems management software products. On March 29, 1999, CA and Platinum announced the Merger Agreement, pursuant to which CA would purchase all issued and outstanding shares of Platinum through a $3.5 billion cash tender offer. Thereafter, CA and Platinum filed the pre-acquisition Notification and Report Forms required by the HSR Act.

After reviewing the parties' HSR filings, DOJ opened an investigation that led to the filing of a Complaint on May 25, 1999, alleging that CA's proposed acquisition of Platinum would eliminate substantial competition and result in higher prices in certain mainframe systems management software markets. *See United States v. Computer Associates International Inc., et al.* (D.D.C. 99-01318 (GK)). Simultaneously with the filing of the Complaint, the parties reached an agreement that allowed CA and Platinum to go forward with the merger, provided that CA sell certain Platinum mainframe systems management software products and related assets. The HSR waiting period expired on May 25, 1999. Three days later, CA announced that it had accepted for payment all validly tendered Platinum shares and the Defendants thereafter consummated the merger. Platinum survived the merger and is now a wholly-owned subsidiary of CA.

2. CA and Platinum agreed that CA would approve certain Platinum customer contracts

Section 5.1 of CA's Merger Agreement with Platinum, titled "Conduct of Business," sets forth numerous covenants made by Platinum as part of the agreement to be acquired regarding how it would conduct its business during the pre-consummation period. One provision, commonly found in merger agreements, required Platinum to carry on its business "in the ordinary course in substantially the same manner as heretofore conducted." The Merger Agreement, however, also contained provisions not normally found in merger agreements that severely restricted Platinum's ability to engage in business as a competitive entity independent of CA's control. Section 5.1(j) prohibited Platinum, without the prior written approval of CA, from:

> enter[ing] into any agreement pursuant to which [Platinum] will provide services

> for a term of more than 30 days at a fixed or capped price; . . . enter[ing] into any customer sale or license agreement with non-standards terms or at discounts from list prices in excess of 20%; . . . [and] enter[ing] into or amend[ing] any contract to provide for "*year 2000*" remediation services.

CA retained the right to be the "sole arbiter" of whether to grant exceptions to these conduct of business restrictions. In its May 14, 1999, SEC 10-Q filing, Platinum conceded that the Merger Agreement placed Platinum substantially under CA's operational control, stating:

> Also, the merger agreement imposes extremely tight restrictions on [Platinum's] ability to take various actions and to conduct its business without Computer Associates' consent. These restrictions could have a severe detrimental effect on [Platinum's] business.

Platinum 10-Q (5/14/99). CA further entered into consulting and non-compete agreements with Platinum's Chief Executive Officer, Chief Financial Officer, and Chief Operating Officer that included provisions providing that each may be held personally liable if Platinum failed to comply with the competitive restrictions of Section 5.1(j) of the Merger Agreement.

Platinum changed its ordinary customer contract approval procedures to ensure that the company operated in accordance with the limitation imposed by Section 5.1(j) of the Merger Agreement and that any exceptions were approved by CA. Under the new procedures, Platinum sales representatives were required to complete contract pre-approval forms. The forms identified the customer, the products or services offered, list price, discount, and a justification for the discount. Platinum sales representatives were required to attach supporting documents such as the proposed contract or statement of work. The forms also contained a section for CA to note its approval.

For proposed contracts that did not conform to the business restrictions imposed by Section 5.1(j) of the Merger Agreement (for example, a contract proposing a discount greater than 20%), the Platinum sales representatives were required to submit the pre-approval forms and supporting documents to a contract review and approval team located at Platinum's Illinois headquarters. The team was composed of two Platinum employees and a CA Division Vice President. The CA Vice President had final authority to approve or reject the contract or request additional information from the Platinum sales force. On several occasions, the CA Vice President consulted with other CA executives before approving or rejecting a proposed contract. CA exercised control over Platinum's customer contract process through this approval authority. Platinum maintained a database to track contracts in the pre-approval process which contained competitively sensitive information relating to customer-specific proposals and noted whether CA had approved or rejected the contract. CA had access to this database.

3. CA exercised operational control over Platinum's ability to price its products and services and set other terms and conditions of sale

CA, during the HSR waiting period, took operational control over Platinum's ability to price its products and services, set other terms and conditions of sale, enter into fixed-price contracts over 30 days, and offer Y2K remediation services.

Discounts: Before the merger announcement, Platinum routinely gave software discounts over 20%, and discounts up to 80% were not uncommon. Platinum also commonly discounted consulting services more than 20%. After implementation of the new discounting restrictions and contract approval procedures, some Platinum sales representatives modified their normal discounting practices and kept discounts below the levels on which CA and Platinum had agreed, including bids where the sales representative would have otherwise recommended, and Platinum

would likely have approved, discounts above the agreed-upon levels. Other Platinum sales representatives submitted, under the newly established process, proposed contracts seeking discounts greater than 20%. However, these requests were subject to review and approval by CA. In some cases, where CA found the justification given to support an exception was insufficient, CA requested further explanation or required the offer to be modified before granting approval.

Other Contract Terms: Prior to the merger announcement, Platinum often deviated from the terms in its standard contract and accepted non-standard terms, such as terms proposed by customers. Under the Merger Agreement, Platinum was prohibited from offering non-standard terms without CA approval. After the merger announcement, CA approved some contracts containing non-standard terms and returned others to the sales representative for revision before granting approval.

Fixed-Price Contracts: Prior to the merger announcement, Platinum offered to provide consulting services for more than 30 days for a fixed price where Platinum performed a particular task for the stated price and assumed the risk of any cost overruns. The Merger Agreement prohibited Platinum from entering into consulting services contracts with fixed prices of more than 30 days in length. Although the Merger Agreement allowed fixed-price contracts shorter than 30 days, Platinum sales representatives were notified that no fixed-price contracts could be presented to customers without CA approval. Subsequently, all computer consulting service contracts, including fixed-price contracts, were submitted to CA for approval. CA approved many, but not all, computer consulting contracts that were submitted for its review.

Y2K Remediation Services: The Merger Agreement prevented Platinum from offering

Y2K services without CA's prior written approval. Almost all new Y2K remediation activities ceased after the merger announcement. CA, however, reviewed all Y2K remediation proposals pending at the time of the merger announcement and a handful of proposals submitted after March 29. CA approved some Y2K remediation contracts and rejected others.

4. Other Indicia CA exercised operational control over Platinum's Business

Finally, CA, during the pre-consummation period, had sufficient control over Platinum's operations that it was able to change Platinum's method of booking revenues and reversed revenues previously recognized for customer contracts. CA even exercised approval authority over Platinum's participation at industry trade shows by canceling Platinum's participation at a trade show where Platinum would have presented its products and sought future business.

B. The Defendants' Agreement To Limit Platinum's Discounts Violated Section 1 Of The Sherman Act

The Complaint alleges that the Merger Agreement and the Defendants' pre-consummation conduct had the effect of lessening or eliminating competition between CA and Platinum in the sale of certain software products in violation of Section 1 of the Sherman Act. Section 1 of the Sherman Act prohibits any "contract, combination or conspiracy" that is "in restraint of trade." The pendency of a proposed merger does not excuse the merging parties of their obligations to compete independently. Thus, pending consummation, activities by one party to control or affect decisions of another with regard to price, output or other competitively significant matter may violate Section 1.

At the time of the tender offer, CA and Platinum were substantial competitors in numerous software markets. Under the Merger Agreement, CA and Platinum agreed that Platinum would not offer discounts greater than 20% off list prices for its software products unless CA approved the discount. In furtherance of this agreement, CA installed one of its Vice Presidents at Platinum's headquarters to review Platinum's proposed customer contracts and exercise authority to approve or reject proposed contracts offering discounts greater than 20%. CA also obtained prospective, customer-specific information regarding Platinum's bids, including the name of the customer, products and services offered, list price, discount, and the justification for any discount. Platinum placed no limits with respect to CA's use of this information. CA used this information to monitor Platinum's adherence to the Merger Agreement's limitation on discounts and to exercise its authority to approve or reject any proposed contract that offered discounts over 20%. The Defendants' conduct had the effect of lessening or eliminating competition between them in the sale of various software products.

The Defendants' agreement to limit Platinum's right to independently set the price for its software products and their actions to effectuate this agreement were extraordinary and not reasonably ancillary to any legitimate goal of the transaction.

C. CA's Exercise Of Operational Control Over Platinum Violated The HSR Act

The Complaint asserts that the Defendants' pre-consummation conduct also violated the HSR Act. The United States does not believe that the payment of civil penalties under the HSR Act is subject to the Administrative Procedures and Penalties Act ("APPA"). Consequently, the

civil penalties component of the proposed Final Judgment is not open to public comment.[1] Although the civil penalty component of the Final Judgment is not open to public comment, it is appropriate in this case to use the Competitive Impact Statement to explain our views regarding CA's and Platinum's violation of the HSR Act.

1. The Purpose of the HSR Act

Prior to enactment of the HSR Act, the DOJ and FTC often investigated anticompetitive "midnight mergers" that had been consummated with no public notice. The merged entity thereafter had the incentive to delay litigation so that substantial time elapsed before adjudication and attempted relief. During this extended time, consumers were harmed by the reduction in competition between the acquiring and acquired firms and, if after adjudication, the court found that the merger was illegal, effective relief was difficult to achieve. The HSR Act was designed to strengthen antitrust enforcement by preventing the consummation of large mergers before they were investigated by the enforcement agencies. In particular, the HSR Act prohibits certain acquiring parties from consummating a merger before a prescribed waiting period expires.[2] The

[1] Obtaining civil penalties in a consent judgment is not the type of "consent judgment" Congress had in mind when it passed the APPA. Thus, in consent settlements seeking both equitable relief and civil penalties, courts have not required use of APPA procedures with respect to the civil penalty component of the proposed final judgment. *See United States v. ARA Services, Inc.*, 1979-2 Trade Cas. (CCH) ¶ 62,861 (E.D. Mo.). Moreover, courts in this district have consistently entered consent judgments for civil penalties under the HSR Act without employing APPA procedures. *See, e.g.*, *United States v. Hearst Trust, et al.*, 2001-2 Trade Cases ¶ 73,451 (D.D.C.); *United States v. Input/Output, et al.*, 1999-1 Trade Cas. (CCH) ¶ 24,585 (D.D.C.); *United States v. Blackstone Capital Partners II Merchant Banking Fund, et al.*, 1999-1 Trade Cas. (CCH) ¶ 72,484 (D.D.C.); *United States v. The Loewen Group, Inc.*, 1998-1 Trade Cas. (CCH) ¶ 72,151 (D.D.C.); *United States v. Mahle GMBH, et al.*, 1997-2 Trade Cas. (CCH) ¶ 71,868 (D.D.C.); *United States v. Figgie Int'l, Inc.*, 1997-1 Trade Cas. (CCH) ¶ 71,766 (D.D.C.); *United States v. Foodmaker, Inc.*, 1996-2 Trade Cas. (CCH) ¶ 71,555 (D.D.C.); *United States v. Titan Wheel International, Inc.*, 1996-1 Trade Cas. (CCH) ¶ 71,406 (D.D.C.); *United States v. Automatic Data Processing, Inc.,* 1996-1 Trade Cas. (CCH) ¶ 71,361 (D.D.C.); *United States v. Trump*, 1988-1 Trade Cas. (CCH) ¶ 67,968 (D.D.C.).

[2] The HSR Act requires that "no person shall acquire, directly or indirectly, any voting securities or assets of any other person" until both have made premerger notification filings and the post-filing waiting period has expired. 15 U.S.C. § 18a(a). The post-notification waiting period following a tender offer, as in this proceeding, is

HSR waiting period remedies the problem of "midnight mergers" by keeping the parties separate, thereby preserving their status as independent economic actors during the antitrust investigation. The legislative history of the HSR Act makes this plain. Congress was concerned that competition existing before the merger should be maintained to the extent possible pending review by the antitrust enforcement agencies and the court. Consistent with this purpose, an acquiring person may not, after signing a merger agreement, exercise operational or management control of the to-be-acquired person's business.[3]

2. The Merger Agreement and Defendants' Pre-Consummation Actions Violated the HSR Act by Altering Their Status as Separate Economic Actors

Merger agreements typically contain "interim covenants" limiting the to-be-acquired person's operations during the pre-consummation period. The Merger Agreement between CA and Platinum contained a covenant typically found in most merger agreements that Platinum would continue to operate its business in the ordinary course of business. Such "ordinary course" provisions do not violate the HSR Act.

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15 days from the filing of the premerger notification and then 10 additional days after the parties comply with the enforcement agency's request for additional information, if any. 15 U.S.C. § 18a(b)(1), (e). The enforcement agency may grant early termination of the waiting period, 15 U.S.C. § 18a(b)(2), and often does when the merger poses no competitive problems.

[3] The HSR Regulations also support the United States' position that the exercise of operational control triggers a violation of the HSR Act's prohibition of consummating an acquisition during the waiting period. The Regulations define an "acquiring person" as one who will "hold" voting securities directly or indirectly or through third parties. 16 C.F.R. § 801.2(a). "Hold" was defined as meaning "beneficial ownership," 16 C.F.R. § 801.1(c), but beneficial ownership itself was not defined. In its "Statement of Basis and Purpose" ("SBP"), 43 Fed. Reg. 33450 (July 31, 1978), which accompanied the regulations, the FTC stated that, although "beneficial ownership" was not defined, its existence is to be determined "in the context of particular cases" with respect to the person enjoying the indicia of beneficial ownership. *Id.* at 33459. Consistent with the purpose of the SBP, the transfer of operational or management control is a significant attribute of beneficial ownership that may support the conclusion that the to-be-acquired firm has effectively exited the business prior to the HSR review being completed. *See United States v. Input/Output, et al.*, 1999-1 Trade Cas. (CCH) ¶ 24,585 (D.D.C.); *United States v. Titan Wheel International, Inc.*, 1996-1 Trade Cas. (CCH) ¶ 71,406 (D.D.C.).

The Merger Agreement also contained many other customary covenants, including Platinum's agreement that it would not, without the prior written approval of CA: (1) declare or pay dividends or distributions of its stock; (2) issue, sell, pledge, or encumber its securities; (3) amend its organizational documents; (4) acquire or agree to acquire other businesses; (5) mortgage or encumber its intellectual property or other material assets outside the ordinary course; (6) make or agree to make large new capital expenditures; (7) make material tax elections or compromise material tax liabilities; (8) pay, discharge or satisfy any claims or liabilities outside the ordinary course; and (9) commence lawsuits other than routine collection of bills. The purpose of these standard provisions is to prevent a to-be-acquired person from taking actions that could seriously impair the value of what the acquiring firm had agreed to buy. While these customary provisions limited Platinum's ability to make certain business decisions without CA's consent, they were also reasonable and necessary to protect the value of the transaction and did not constitute the HSR Act violation.

The Merger Agreement, however, did not stop with these customary covenants, but went further to impose extraordinary conduct of business limitations enabling CA to exercise operational control over significant aspects of Platinum's business. These restrictions and CA's exercise of operational control went far beyond ordinary and reasonable pre-consummation covenants and constituted a violation of the HSR Act. In the pre-merger context, an acquiring person may not exercise operational control of the to-be-acquired person's business. This is what CA did in this case.

Platinum, immediately upon executing the Merger Agreement, transferred to CA operational control of substantial aspects of its business, including the right to set prices and

other terms of customer contracts, enter into certain consulting services contracts, account for revenues, and participate at trade shows. To ensure compliance with the Merger Agreement's business restrictions, Platinum's CEO, COO, and CFO were personally liable if the restrictions were not observed. Moreover, a CA Divisional Vice President occupied an office at Platinum's Illinois headquarters where he reviewed proposed Platinum customer contracts and exercised authority to approve or reject contracts. In effect, the decision-making authority with respect to these business activities resided with CA's management, not Platinum's. Further exercising its operational control, CA obtained Platinum's competitively sensitive customer information without any restriction as to its use by CA or its dissemination within CA. This conduct demonstrates that CA and Platinum did not adhere to the requirement of the HSR Act that they remain separate and independent economic entities during the waiting period.

Both CA and Platinum were in violation of the HSR Act from March 29, 1999, the date on which the Merger Agreement was executed, through May 25, 1999, the day on which CA, Platinum, and DOJ agreed to a consent decree resolving DOJ's antitrust concerns.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment contains two forms of relief: (1) injunctive provisions intended to prevent recurrence of the violation of Section 1 of the Sherman Act alleged in the Complaint; and (2) a monetary civil penalty from CA and Platinum for the violation of the HSR Act.

A. Sherman Act Relief

The proposed Final Judgment sets forth the conduct that CA is prohibited from engaging in, certain conduct that CA may engage in without violating the Final Judgment, a compliance program CA must follow, and procedures available to the United States to determine and ensure compliance with the Final Judgment. Section X provides that these provisions will expire ten years after entry of the Final Judgment.

1. Prohibited Conduct

Section IV of the proposed Final Judgment sets forth the substantive injunctive provisions and is designed to prevent the recurrence of the alleged Sherman Act Section 1 violation. Thus, Section IV(A) prohibits CA and a merger partner from agreeing to establish the price of any product or services offered in the United States to any customer during the pre-consummation period. The proposed Final Judgment also would prevent the repetition of the conduct CA employed to facilitate its agreement with Platinum to establish prices. Specifically, Section IV(B) prohibits CA from entering into an agreement to review, approve or reject customer contracts during the pre-consummation period, and Section IV(C) prohibits CA from entering into an agreement that requires a party to provide bid information to another party.

2. Permitted Conduct

Section V of the proposed Final Judgment identifies certain agreements and conduct that are not prohibited by the Judgment. Sections V (A), (B) and (C) authorize the use of certain "interim covenants" that are either typically found in merger agreements or are not likely to restrict competition. Section V(A) permits the use of a provision that requires the to-be-acquired person to operate its business in the ordinary course consistent with past practices.

Section V(B) permits the use of material adverse change provisions which give the acquiring person certain rights in the event there is a material adverse change in the to-be-acquired person's business. These are customary provisions found in most merger agreements and are intended to protect the value of the transaction and prevent the to-be-acquired person from wasting assets. Under Section V(C), CA would be able to prevent a to-be-acquired person from offering customers during the pre-consummation period enhanced rights or refunds of any nature upon a change of control of the to-be-acquired firm. For example, CA could prohibit a to-be-acquired person from offering a full refund of all license and maintenance fees if CA consummates the merger. The use of such a provision is not likely to restrict competition.

Section V(D) recognizes a narrow exception to the prohibition in Section IV(C) concerning CA's access to customer bid information. As a general rule, in a merger between competitors one merging party should not obtain another party's prospective, customer-specific bid information prior to consummation of the transaction. Access to such information raises significant antitrust risks because it could be used to reduce competition during the pre-consummation period or after if the transaction is subsequently abandoned or blocked. There may be situations, however, where a merging party has a legitimate business need for certain bid information prior to closing. For example, during the due diligence process a party may need information regarding pending contracts in the pipeline to properly value the business or to assess the future growth of the business. To reduce antitrust exposure where bid information is necessary for due diligence purposes, merging parties generally consult with counsel about the specifics of their particular situation and adopt a variety of safeguards. Such safeguards may include employing an independent agent to collect the information and present the information in

an aggregated or other form that shields customer-specific and other competitively sensitive information. In addition, a non-disclosure agreement is often used to limit use of any bid information for due diligence purposes. In some cases, merging parties opt not to receive bid information, and instead use other mechanisms to adjust the value after closing.

Under Section V(D), CA may obtain pending bid information of the other party for due diligence purposes only to the extent that the bids are material to the understanding of the future earnings and prospects of the other party and only pursuant to an appropriate non-disclosure agreement. This non-disclosure agreement must ensure that CA employees who receive material bid information do not use the information to harm competition. Material bid information may only be provided to CA employees who have a legitimate need for the information, such as employees with due diligence responsibilities or who are responsible for negotiating the transaction. In addition, material bid information may not be provided to CA employees who are directly involved in the marketing, pricing or sale of competing products. Thus, the information may not be provided directly or indirectly to any CA employee involved in day-to-day sales or marketing activities or otherwise used in the sales process. With respect to non-material bids, CA may not obtain such information except where necessary for due diligence purposes and where the information is collected by an independent agent, subject to appropriate use and confidentiality limitations.

This limited access to bid information is consistent with the relief sought in the Complaint. The Complaint alleged that CA collected and used Platinum's bid information in furtherance of its agreement to limit Platinum's discounts. The Complaint did not address the

situation where CA had a legitimate need for material bid information and where such information was provided subject to appropriate limitations and confidentiality protections.

Finally, Sections V(E) and (F) clarify that the proposed Final Judgment does not prohibit CA from entering into certain price agreements or engaging in certain joint activities that would have been lawful independent of the proposed merger. Section V(D) permits price agreements in the context of an otherwise lawful joint bid situation, and Section V (E) permits price agreements in an otherwise lawful distribution relationship.

3. Compliance

Sections VI and VII of the proposed Final Judgment set forth various compliance procedures. Section VI sets up an affirmative compliance program directed toward ensuring CA's compliance with the limitations imposed by the proposed Final Judgment. The compliance program includes the designation of a compliance officer who is required to distribute a copy of the Final Judgment to each present and succeeding director, officer, employee and agent with responsibility for mergers and acquisitions, brief each such person regarding compliance with the Final Judgment, and obtain certifications from each such person that they have received a copy of the Final Judgment and understand their obligations under the Judgment. In addition, the compliance officer must provide a copy of the Final Judgment to a potential merger partner before the initial exchange of a letter of intent, definitive agreement or other agreement of merger. Section VI of the proposed Final Judgment further requires the compliance officer to certify to the United States that it is in compliance and report any violations of the Final Judgment.

To facilitate monitoring CA's compliance with the Final Judgment, Section VII grants DOJ access, upon reasonable notice, to CA's records and documents relating to matters contained in the Final Judgment. CA must also make its personnel available for interviews or depositions regarding such matters. In addition, upon request, CA must prepare written reports relating to matters contained in the Final Judgment.

These provisions are fully adequate to prevent recurrence of the type of illegal conduct alleged in the Complaint. The proposed Final Judgment should ensure that CA in future mergers or acquisitions will not enter into agreements to limit price competition during the pre-consummation period. Consequently, customers will receive the benefits of free and open competition.

B. Civil Penalties

Under Section (g)(1) of the HSR Act, 15 U.S.C. § 18a(g)(1), any person who fails to comply with the Act shall be liable to the United States for a civil penalty of not more than $11,000 for each day during which such person is in violation of the Act.[4] As the Stipulation and proposed Final Judgment indicate, Defendants have agreed to pay civil penalties totaling $638,000 within 30 days of entry of the Final Judgment. While the United States was prepared to seek civil penalties totaling $1,267,000 at trial, the uncertainties inherent in any litigation led to acceptance of $638,000 as an appropriate civil penalty for settlement purposes. Moreover, this

[4] The maximum daily civil penalty, which had been $10,000, was increased to $11,000 for violations occurring on or after November 20, 1996, pursuant to the Debt Collection Improvement Act of 1996, Pub. L. 104-134 § 31001(s) and Federal Trade Commission Rule 1.98, 16 C.F.R. § 1.98, 61 Fed. Reg. 54548 (Oct. 21, 1996).

civil penalty should be sufficient to deter CA and other acquiring persons from exercising operational control over a to-be-acquired person during the HSR waiting period.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal district court to recover three times the damages the person has suffered, as well as the costs of bringing a lawsuit and reasonable attorneys fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no effect as *prima facie* evidence in any subsequent private lawsuit that may be brought against defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by this Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry of the decree upon this Court's determination that the injunction portion of the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Sherman Act injunction contained in the Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the *Federal Register*. The United States will evaluate and respond to the comments. All comments will be given due consideration by DOJ, which remains

free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the response of the United States will be filed with this Court and published in the *Federal Register*. Written comments should be submitted to:

Renata B. Hesse
Chief, Networks and Technology Section
United States Department of Justice
Antitrust Division
600 E. Street, N.W., Suite 9500
Washington, D.C. 20530

The proposed Final Judgment provides that this Court retains jurisdiction over this action, and the parties may apply to this Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendants. The United States is satisfied, however, that a trial would not result in further injunctive relief than is contained in the proposed Final Judgment. Moreover, the proposed injunctive relief and payment of civil penalties are sufficient to achieve the primary objective of the litigation -- deterring CA and any potential merger partner from entering into agreements on price and from failing to comply with the waiting period requirements of the HSR Act.

VII. STANDARD OF REVIEW UNDER THE APPA FOR PROPOSED FINAL JUDGMENT

The APPA requires that injunctions of anticompetitive conduct contained in proposed consent judgments in antitrust cases brought by the United States be subject to a sixty (60) day comment period, after which the court shall determine whether entry of the proposed Final

Judgment is "in the public interest." In making that determination, the court *may* consider--

> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
>
> (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e) (emphasis added). As the Court of Appeals for the District of Columbia has held, the APPA permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the Government's Complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See United States v. Microsoft Corp.*, 56 F.3d 1448, 1458-62 (D.C. Cir. 1995).

In conducting this inquiry, "the Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process."[5] Rather,

> absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are

[5] 119 CONG. REC. 24,598 (1973). *See United States v. Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, those procedures are discretionary (15 U.S.C. § 16(f)). A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. *See* H.R. Rep. No. 93-1463, 93rd Cong. 2d Sess. 8-9 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6535, 6538.

reasonable under the circumstances.[6]

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.,* 858 F.2d 456, 462-63 (9th Cir. 1988), *quoting United States v. Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981); *see also Microsoft,* 56 F.3d at 1458. Precedent requires that

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest.*" More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[7]

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. A "proposed decree must be approved even if it falls short of the remedy the court would impose on

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[6] *United States v. Mid-America Dairymen, Inc.,* 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977); *see also United States v. Loew's Inc.*, 783 F. Supp. 211, 214 (S.D.N.Y. 1992); *United States v. Columbia Artists Mgmt., Inc.*, 662 F. Supp. 865, 870 (S.D.N.Y. 1987).

[7] *United States v. Bechtel Corp.,* 648 F.2d at 666 (citations omitted) (emphasis added); *see United States v. BNS, Inc.,* 858 F.2d at 463; *United States v. National Broadcasting Co.*, 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); *United States v. Gillette Co.,* 406 F. Supp. at 716. *See also United States v. American Cyanamid Co.*, 719 F.2d 558, 565 (2d Cir. 1983), *cert. denied,* 465 U.S. 1101 (1984).

its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'"[8]

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States alleges in its Complaint, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459. Since the "court's authority to review the decree depends entirely on the Government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that the Court "is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States might have but did not pursue. *Id*.

[8] *United States v. American Tel. & Tel. Co.,* 552 F. Supp. 131, 151 (D.D.C. 1982) (*quoting Gillette,* 406 F. Supp. at 716), *aff'd sub nom. Maryland v. United States,* 460 U.S. 1001 (1983); *United States v. Alcan Aluminum, Ltd.,* 605 F. Supp. 619, 622 (W.D. Ky. 1985); *United States v. Carrols Dev. Corp.*, 454 F. Supp. 1215, 1222 (N.D.N.Y. 1978).

III. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: April 23, 2002

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Competitive Impact Statement was hand delivered this 23rd day of April 2002, to:

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